In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-491

VERNON HENRY SCHNEIDER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-5608

EDWARD EUGENE DACE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the consecutive sentences imposed upon them on mail fraud charges should be reduced and that the district court abused its discretion in refusing to reveal the contents of the presentence report to defense counsel.

In an indictment returned in the United States District Court for the Eastern District of Missouri, petitioners were charged with mail fraud in violation of 18 U.S.C. 1341. Petitioner Schneider was named as a defendant in seven of the 26 counts, and petitioner Dace was named in 24 counts. The indictment charged that petitioner Schneider, a claims representative, and petitioner Dace, a claims supervisor of the Hartford Insurance Group, devised a scheme to defraud their employer by adjusting fraudulent insurance claims and causing checks to be issued in payment of these claims and that, as part of this scheme, Schneider secured false police reports to substantiate the false claims (Pet. App. A25-A27).

Each petitioner pleaded guilty to three counts, and the remaining counts were dismissed. Prior to sentencing, petitioners requested permission to examine their presentence investigation report, which the district court refused to grant. On May 17, 1973, the court sentenced each petitioner to two consecutive terms of five years' imprisonment followed by five years' probation on the third count.

Thereafter petitioners moved for a reduction of sentence under Fed. R. Crim. P. 35. Following a hearing, the motions were denied by the district court. A divided panel of the court of appeals affirmed. The majority, following the Eighth Circuit's *en banc* decision in *Woosley* v. *United States,* 478 F.2d 139, reviewed the sentences to determine whether they constituted a manifest or gross abuse of discretion (Pet. App. A2-A4). It also examined the presentence investigation reports and concluded that it was "satisfied that the presentence reports do not contain material misinformation or unverified derogatory hearsay of such a nature that it can be said the trial court abused its discretion in not revealing" the report before imposing sentence (Pet. App. A4-A7).[1]

[1]The dissent stated that there "exists no possible reason for such severe punishment other than the district court's reliance on uncorroborated hearsay contained within the presentence reports," noting

1. It is well established that the district court has wide discretion to determine the appropriate sentence to be imposed. *United States* v. *Tucker,* 404 U.S. 443, 446-447. When the sentence imposed is within the statutory limits, as in the instant case, it is generally not subject to review. *United States* v. *Tucker, supra; Gore* v. *United States,* 357 U.S. 386, 393; *United States* v. *Grene,* 455 F.2d 376, 377 (C.A. 5), certiorari denied, 409 U.S. 856.

To support their contention that the sentences imposed were so excessive as to constitute an abuse of discretion and cruel and unusual punishment in violation of the Eighth Amendment, petitioners point to their records of good behavior and the fact that more lenient sentences have been imposed in other mail fraud cases. Petitioners' histories were, however, made known to the district court before sentencing (Tr. 8-9). The district court was also provided with a presentence investigation report. The district court therefore possessed the information necessary to determine the appropriate sentences. Although petitioners had no prior criminal record (other than a prior misdemeanor in the case of Dace), they were involved in a sophisticated and well executed scheme to defraud the Hartford Insurance Group of substantial amounts of money, which scheme involved at least forty fraudulent claims. Given these circumstances, it was within the court's discretion to conclude that petitioners' conduct merited severe sentences. See, *e.g., United States* v. *Smallwood,* 443 F.2d 535 (C.A. 8), certiorari denied, 404 U.S. 853; *Mitchell* v. *United States,* 142 F.2d 480 (C.A. 10), certiorari denied, 323 U.S. 747; *Becker* v. *United States,* 91 F.2d 550 (C.A. 9).

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particularly a statement within the presentence report that postal inspectors "feel" that these defendants participated in many more fraudulent claims (Pet. App. A7). The dissent also would have directed the district court to consider immediate probation (Pet. App. A21).

2. As to petitioners' contentions that the district court should have revealed the contents of the presentence report, Rule 32(c) explicitly places the decision whether to disclose the contents of the presentence report to defense counsel within the sound discretion of the trial court. *Gregg* v. *United States,* 394 U.S. 489, 492; *United States* v. *Schrenzel,* 462 F.2d 765, 775 (C.A. 8), certiorari denied, 409 U.S. 984. The court below determined that the presentence report did not include material misinformation or unverified derogatory hearsay that influenced the district court in imposing the sentence (Pet. App. A5-A6). On the contrary, the presentence report stated that the victim company had paid out over $50,000 on at least forty fraudulent claims between December 1967 and July 1971 presented by petitioners—a description which is consistent with the scheme described in the indictment, to three counts of which petitioners pleaded guilty. In these circumstances, therefore, the district court did not abuse its discretion by withholding the reports.

Petitioners in effect urge a change in the rules making it routine practice to turn presentence reports over to the defendant. Indeed, the recently proposed amendments to the Rules of Criminal Procedure transmitted to Congress on April 22, 1974, would, in proposed Rule 32(c)(3), make disclosure of the presentence report to the defendant mandatory upon request except in a few well-defined circumstances. But those amendments have not yet been approved.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.